IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MKUYE, J.A., GALEBA, J.A. And MASOUD, J.A.)

CRIMINAL APPEAL NO. 625 OF 2021

MASALI LUKANYA ..... 1ST APPELLANT

LUSWAGA LEONARD ..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of Resident Magistrates' Court of Tabora at Tabora)

(Kato, SRM-Ext. Jur.)

Dated the 3rd day of September, 2021
in
Criminal Appeal No. 53 of 2021
.....

JUDGMENT OF THE COURT

26th September & 6th October, 2023

MKUYE, J.A.:

The appellants, Masali Lukanya and Luswaga Leonard together with a co-accused, who was acquitted on appeal to the first appellate court, were arraigned before the District Court of Urambo at Urambo on three counts, to wit; the 1st count of armed robbery contrary to section 287A of the Penal Code, Cap 16 [R.E 2002 now 2022] (the Penal Code) and two counts of grievous harm contrary to section 225 of the Penal Code. Upon the conclusion of the trial, the appellants were convicted on

the 1st count of armed robbery and acquitted on the 2nd and 3rd counts of grievous harm for lack of evidence. Eventually, they were both sentenced to thirty years imprisonment. Being aggrieved with that decision, the appellants unsuccessfully appealed to the Resident Magistrates' Court at Tabora (Kato, SRM-Ext. Jur.) (the first appellate court) while the appeal for their co-accused was allowed. Still protesting their innocence, they have now appealed to this Court.

In the trial court, the prosecution marshalled four witnesses while for the defence only three witnesses testified.

PW1, Siwema Lutonja, the complainant, testified that on 27/9/2017 at midnight while asleep with her child (PW2) heard a bang on the door of her house and then people entered inside her house. Those people started beating her while demanding to be given money. They had a stone, a club and a bush knife which they used to cut her. PW1 testified that she was able to identify the culprits as males through the solar bulb in her house and that she knew them by face and names. For better appreciation of what transpired, we take the liberty to reproduce what PW1 stated in court:

> *"On 27/9/2017 midnight I was asleep at my home together with my child namely Selemani Rashid, I heard the "bang" on the door of my house and people got inside my house ... people invaded me and beat me and forced me to give them money one of those people cut me with a bush knife on my arm, they were two males who got inside with a stone, bush knife and rungu a (club) on their hands. I* ***had solar bulbs in my house*** *that is why I observed them as males. I managed to identify observe and identity those culprits by face and names, they were Masali the 2nd accused and Buswaga the 3rd accused person..."* [Emphasis added]

PW1 went on testifying that when they failed to get the money, they took her mobile phone and clothes. In the morning they reported the matter to the Village Executive Officer (VEO) of Ibambo village where they were given a letter to go to Tabora Police Station and thereafter, she went to Kitete Hospital for treatment.

Selemani Rashid (PW2) who was aged 14 years old testified upon being affirmed. His testimony was almost the same as PW1 as on the material night he slept together with his mother (PW1). Of importance, he also testified to have identified Masalu and Buswaga through solar

bulb in the house. He testified further on how in the morning, they went to the VEO's office and then to Kitete Hospital for treatment. On cross examination by the 2nd accused, he insisted that it **was solar bulb** which enabled him to observe.

Juma Kalumbu, (PW3) the Village Chairman testified to the effect that, when PW1 went to report at his office, he was not there and was attended by his assistant. However, on coming back to the office, he found the names of the suspects left by the complainant and that he called the OCS for Ulyamkulu Police Station who instructed him to trace those suspects. He then called Masali and Buswaga who reported to the office and that is when they were arrested. PW3 testified to have visited the victims house and found the door broken.

Emmanuel Robert (PW4), the Hamlet secretary testified on how PW1 was invaded on the fateful night and visited her home after being informed at night. On arrival at the scene, he witnessed things scattered and blood spilled all over while the victim was injured. He testified that PW1 mentioned Buswaga and Masali as her assailants; and that he took the victim to VEO's office and efforts to trace the suspects commenced.

In defence, Masali Lukanya who testified as DW2 explained on how on 27/9/2017 at 08:30hrs was called by the Ag VEO to report to the office which he obliged only to be told that he invaded the victim. However, much as he did not deny knowing the complainant as they used to go together to *mnadani* for cattle business, he denied involvement in the crime. He insisted that, the case could be a frame up since his relationship with her was terminated.

Luswaga Leonard (DW3), also testified on how on 27/9/2017 morning he was called by the Village Chairman (PW3) to report to his office and on reporting he was informed about the incident of invading PW1. However, he denied involvement while challenging the intensity of light which enabled the victim to identify him.

The trial court convicted the two appellants on the grounds that the culprits and victims lived in the same village and therefore, they knew each other. It also found that there were bulbs shining the house and that the victims had closely seen all the culprits. In the end, the trial court convicted the appellants on the first count of armed robbery and acquitted them on the 2nd and 3rd count of grievous harm as was hinted earlier on.

In upholding the conviction and sentence, the first appellate court was satisfied that the appellants were clearly identified by the aid of solar light and that they were identified by names, being village mates and working together.

Aggrieved by the first appellate court decision, the appellants have now appealed to this Court based on six identical grounds of appeal as follows: **one**, the case against the appellants was not proved beyond reasonable doubt; **two**, the appellants were not positively identified at the scene of crime "*partiap criminis*"; **three**, PW2 did not make a prior promise of telling the truth and not lies; **four,** both PW1 and PW2 did not name the appellants to the next person or at the earliest possible time; **five,** (for the 2nd appellant only) the arresting officer was not summoned to testify. **Six**, the defence case was not considered.

At the hearing of the appeal, both appellants appeared in person without any representation whereas the respondent Republic enjoyed the services of Mr. Merito Ukongoji, the learned Senior State Attorney.

On being called upon to expound their appeals, both appellants adopted their respective memoranda of appeal and preferred the

learned Senior State Attorney to respond first before they could rejoin later, if the need would arise.

In the first place, Mr. Ukongoji prefaced his submission by declaring his stance that he was supporting both the conviction and sentence meted out against the appellants.

Having examined the grounds of appeal and the submissions by the learned Senior State Attorney, we propose to deal with the appeal starting with ground no. 3, followed by grounds nos. 2 and 4 together, then ground no. 6 and lastly ground no. 1.

With regard to the appellants' complaint in ground no. 3 that PW2 did not make a promise of telling the truth and not lies, Mr. Ukongoji conceded that PW2 testified when he was 14 years old. However, he argued that, he gave his evidence after having been affirmed, implying that he knew the duty of telling the truth and therefore, there was no need for preliminary questions or inquiry on him to test if he understood the nature of oath. He did not, however, produce any authority to support his argument.

The law governing reception of evidence of children of tender age is section 127 (2) of the Evidence Act Cap 6 [R.E. 2002 now 2022] (the Evidence Act). The said provision states that:

> *"A child of tender age may give evidence without taking oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell lies."*

According to the above cited provision, it is clear that the child of a tender age can give his/her evidence without oath or making an affirmation; and that before such child gives evidence, he/she must promise to tell the truth to the court and not to tell lies. For avoidance of doubt, we wish to state at this juncture that the child envisaged in this provision is the one whose apparent age is not more than fourteen years as per section 127 (4) of the Evidence Act.

But how can one determine that a child is of tender age who can give evidence upon making such a promise? The answer is not farfetched. In the case of **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018 (unreported) [2019] TZCA 108, we provided a guide on arriving to such conclusion as follows:

> *"... the trial court should at the foremost, ask few pertinent questions so as to* ***determine whether or not the child witness understands the nature of oath. If he replies in the affirmative then he or she can proceed to give evidence on oath or affirmation depending on the religion professed by such child witness****. If such child does not understand the nature of oath, he should before giving evidence, be required to promise to tell the truth and not to tell lies."* [Emphasis added].

In this case, the record bears that indeed, PW2 was 14 years old when he testified in court. The record also shows that he gave evidence after being affirmed and thus he did not promise to tell the truth in court and not lies as required by section 127 (2) of the Evidence Act. The question we ask ourselves is that, PW2 being a child aged 14 years at the time when he testified, wasn't there a need to inquire from him if he understood the nature of oath before he testified? We ask such question because, there is nowhere in the record showing how the trial court determined to allow him to give evidence on affirmation. According to the case of **Godfrey Wilson** (supra) the child ought to show that he

understood the nature of oath through some pertinent questions which were to be asked by the court. That was not done.

In our considered view, in the absence of proof of how PW2 understood the nature of oath before he was allowed to testify on affirmation or rather allowing the witness to testify on affirmation without conducting an inquiry to determine whether he understands the nature of oath or affirmation was a fatal irregularity which renders his evidence to have no evidential value. As such, we do not agree with the learned Senior State Attorney that the preliminary inquiry was not needed as he seemed to convince us. Eventually, we uphold the complaint by the appellants and proceed to disregard the evidence of PW2.

In relation to grounds nos. 2 and 4 challenging the appellants' identification, Mr. Ukongoji submitted that the appellants were properly identified due to solar bulb in the house. He added that, PW1 was familiar with the appellants since she knew the 1st appellant as an auctioneer whom she used to travel with to the auctions (mnadani); and the 2nd appellant as a motorcycle rider. The learned Senior State Attorney argued further that PW1 mentioned the appellants (suspects) to PW4 immediately after the incident when they reported to the office

and left the names to the village chairman's assistant since he was not there. To bolster his argument, Mr. Ukongoji referred us to the case of **Samwel Nyamhanga v. Republic**, Criminal Appeal No. 70 of 2017 (unreported) at pg. 14. It was his further submission that, PW1 had ample time to observe the appellants as they stole her mobile phone and clothes; and that the distance from where she observed them was minimal due to the acts done, deducing from PW1's testimony.

Regarding the issue of visual identification, it is now settled that it is the weakest kind of evidence and most unreliable and thus courts are warned not to act on it unless all the possibilities of unmistaken identity are eliminated – See (**Waziri Amani v. Republic**, [1980] TLR 250).

Thus, in times without number, this court has emphasized that when a case is centered on evidence of visual identification, such evidence has to be watertight before arriving at a conviction – See **Hamisi Ally and 3 Others v. Republic**, Criminal Appeal No. 596 of 2015 (unreported). Besides that, in a criminal case whose determination is dependent upon visual identification evidence, the evidence on conditions favouring a correct identification is of utmost importance - See **Raymond Francis v. Republic**, [1994] TLR 100.

In the instant case, it is common ground that the incident took place at midnight. PW1 testified that she was able to identify the appellants through the solar bulb in the house as clearly shown in the testimony we had quoted earlier on. The other factor which enabled the identification, according to her testimony, is that she was familiar with the appellants, the first one being her follow businessman whom they used to travel together to various auctions when they used to deal with cattle business and the 2nd appellant was a motorcycle rider.

On our part, having examined the record of appeal and considered the rival submissions, we are in agreement with the appellants that they were not properly identified. This is so because, as shown in the above excerpt, PW1 said she was able to identify the appellants due to solar bulb in her house without more. This evidence as it is, connotes that there was a bulb in the house regardless of whether it was switched on or not. We are told that the offence was committed at midnight. However, PW1 did not explain in her testimony if the said solar bulb was on or not. More importantly, the intensity of the light (if there was any) was not explained although, unfortunately both courts below added extraneous matters when discussing the issue of identification. The trial court found that there was light shining in the house and the first

appellate court said that there was solar light power which, did not feature in PW1's testimony. Ordinarily, since the offence was committed at midnight, it was expected that PW1 would have explained the light which enabled identification and its intensity. The importance of showing the type of light and its intensity which enabled the witness to identify his/her culprits is crucial to enable the court gauge if it was sufficient or weak.

Regarding the issue of familiarity between PW1 and appellants as they knew each other even before the incident and naming the appellants to PW2 and PW4, we do not have qualms on them. Familiarity between the suspect and the witness is among the factors for consideration in evidence of visual identification – See **Amani Waziri** (supra) and many others. In most of the cases it has been taken to be among the factors favoring a proper identification. Also, mentioning the suspect at the earliest possible time is an assurance of reliability of the witness' testimony as was held in the case of **Samwel Nyamhenga** (supra) while quoting from the case of **Jaribu Abdallah v. Republic** [2003] TLR 271.

However, it is noteworthy that identification by recognition may be reliable unlike identification of a stranger but still mistaken identity

may happen. This we categorically stated in the case of **Shamir John v. Republic**, Criminal Appeal No. 166 of 2004 (unreported) thus:

> *"...recognition may be more reliable than identification of a stranger but even* ***when the witness purporting to recognize someone whom he knows, the court should always be aware that mistakes in recognition of close relative and friends are sometimes made.****"*[Emphasis added]

In this case, it is without question that PW1 and the appellants were familiar to each other as was also confirmed by the 1st appellant. It is also on record that PW1 mentioned the appellants to PW3 and PW4 at the earliest possible time which also tend to give credence to identification evidence.

However, the fact that PW1 did not explain the type of light and its intensity which enabled her to identify the appellants considering that the offence was committed in the midnight taints the evidence of visual identification. In other words, in the absence of evidence relating to the kind of light and its intensity, we cannot with certainly say that the other factors such as the familiarity between the witness and the appellants could have enabled a correct identification of the appellants. Also, even

the contention that PW1 mentioned the appellants to PW3 and PW4 at the earliest possible time cannot stand because even in the identification by recognition, mistaken identity cannot be overruled.

We are mindful that the learned Senior State Attorney also implored the Court to find that the witness had ample time to observe the appellant basing on the fact that they stole the mobile phone and clothes; and that the distance from where she observed was minimum because they hit her with a bush knife. Upon being prompted, if those circumstances featured in the witness' testimony he said that, could be deduced from the evidence. On our part, we are not prepared to take that line of argument lest, we shall fall into the trap of speculation. This is so because, PW1 did not adduce evidence as to how long the attack took, and the distance between her and the invaders. In that regard, we find that the appellant's were not properly identified.

The complaint in ground No. 5 is that the appellants' defence evidence was not considered. On the other hand, it was Mr. Ukongoji's argument that their evidence was considered. He pointed out that even the first appellate court remarked that it was considered as shown at page 89 of the record of appeal. Upon being prompted by the court, he on reflection conceded that it was not considered at all.

Our perusal of the court record has revealed that, indeed, the 1st appellant who testified as DW2 had absorbed himself from the commission of the offence though he did not deny knowing PW1 who was once his lover whom they broke suggesting that the case was a result of bad blood. On his part, the 2nd appellant (for DW2) did not give any meaningful defence.

Looking at the trial court's decision it is vivid that it did not address the 1st appellant's defence on the allegation of bad blood with PW1. Unfortunately, even the first appellate court did not do so despite the fact that it was among the complaints by the appellants. Instead, at page 89 of the record of appeal, it found that the trial court had considered it.

As to the way forward, unlike the learned Senior State Attorney's proposition that the matter be remitted to the lower court for consideration of the defence evidence, we have a different view. It is settled law that where the courts below fail to consider such evidence, this Court can step into the shoes of the first appellate court and do what it was supposed to do and evaluate the defence evidence not considered by it – See **Director of Public Prosecutions v. Jaffari Mfaume Kawawa**, [1981] TLR 149 and **Iddy Salum @ Fredy v.**

Republic, Criminal Appeal No. 192 of 2018 (unreported). In this regard, we are of the considered view that stepping into the shoes of the first appellate court and do what it was supposed to do is inevitable because having perused the record of appeal it is glaring that the defence evidence was not considered.

Having given much thought over the 1st appellant's defence evidence suggesting bad blood with PW1, we think, the trial court could not have been in a position to adequately address such evidence and assess it because it was raised during his defence. The appellant's line of defence ought to have been introduced during cross examination to PW1 as was held in the case of **John Madata v. Republic**, Criminal Appeal No. 453 of 2017 (unreported) that:

> *"It is common knowledge that although the accused has a duty to prove his innocence, he is expected to make the theme of his defence known so as to make the trial fair even to the prosecution, and we think, this theme may be deduced from the line of cross examinations or notices such as when the said accused intends to raise a defence of alibi. We endorse as correct what the High Court (Lugakingira, J. as he then*

was) said in ***Mohamed Katindi v. Republic,*** *[1986] TLR 134, holding No. (iii);*

It is the obligation of the defence counsel, both in duty to his client and as officer of the court to indicate in cross examination the theme of his clients defence so as to give the prosecution an opportunity to deal with that theme."

Guided by the above cited authority, we are of the view that had the appellant intended to assail PW1's evidence on account of there being bad blood between them, he ought to have raised that claim during cross examination. Raising it, during his defence left the two lower courts with little to go by. Thus, this ground lacks merit and we dismiss it.

The last grievance is that the case was not proved beyond reasonable doubt. In our considered view, in the absence of evidence guaranteeing positive identification of the appellants as we have endeavored to explain above, we are satisfied that the prosecution case was not proved to the hilt, hence, we find that the appeal is merited.

In the event, we allow the appeal, quash the conviction and set aside the sentence meted out against the appellants. We order that

they be released from custody forthwith unless they are held for other lawful cause(s).

It is so ordered.

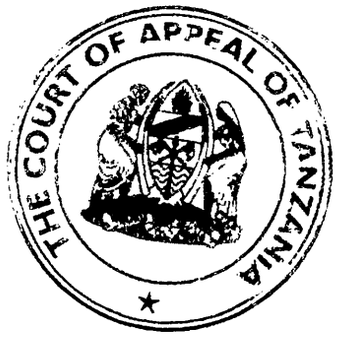
DATED at **TABORA** this 5th day of October, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgment delivered this 6th day of October, 2023 in the presence of the appellants in person and Mr. Magonza Charles, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL